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Supreme Court, U. S.
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No. 72-1521

In the

# Supreme Court of the United States

OCTOBER TERM, 1972

ANTHONY SICILIA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, ANTHONY SICILIA, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this cause on March 1, 1973.

## OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (not yet reported) reversing the order of the District Court of April 21, 1972, granting the Petitioner's motion to suppress evidence is reprinted as Appendix "A", *infra.* The order of the District Court of April 21, 1972, granting the relief sought is reprinted herein in the Statement of the Case.

## JURISDICTION

The judgment of the Court of Appeals reversing the order of the District Court was entered on March 1, 1973. A timely Petition for Rehearing *en banc* was denied on April 13, 1973, and is reprinted as Appendix "B" to this Petition.

The jurisdiction of this Court is invoked under and pursuant to 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

May federal agents in order to secure incriminating statements and a consent to search, interview a person, who is not in physical custody and who unnknowingly has become a focal suspect in a criminal investigation, in a manner calculated to mislead said person as to their true purpose without (1) disclosing the nature of the investigation being made, and (2) without giving said person the *Miranda* warnings?

## STATEMENT OF THE CASE

The Petitioner, ANTHONY SICILIA, was indicted by the March Grand Jury of the Northern District of Illinois charging him with possession of goods stolen from an interstate shipment in violation of 18 U. S. C. Section 659.

The District Court after submission of evidence on the Petitioner's motion to suppress evidence granted Petitioner's motion and the Government appealed. On March 13, 1972, the Court of Appeals remanded this cause to the District Court for the District Judge to record his findings of fact and conclusions thereon because the factual and legal context were somewhat complicated. The opinion of the Court of Appeals remanding this cause

is reported in 457 F. 2d 787 (7th Cir. 1972) and is reprinted herein as Appendix "C", *infra.*

Thereafter, on April 21, 1972, the District Judge did record his findings of facts and conclusions of law and the Government appealed from this order which is reprinted herein in its entirety as follows:

FINDINGS OF FACTS

On December 9, 1969, three Clark fork lift trucks were stolen from an interstate shipment and FBI Agents DiStefano and Wisnovsky were assigned to investigate the thefts. On February 26, 1970, Agent DiStefano received information from a confidential informer that one of the stolen fork lift trucks was on the premises of A & S Cartage Company located at 356 North Halsted Street, Chicago, Illinois. Agents DiStefano and Wisnovsy were also informed that the defendant, Anthony Sicilia, was president and owner of A & S Cartage. The agents decided to question the defendant and Agent Meisler, who was never involved in this investigation, went along because he was friendly with and acquainted with the defendant and had spoken to him on different occasions and had known him for about three years. Agent Dolan, who also was never involved in this investigation, also went along.

When they arrived at defendant's premises it was decided that Agents DiStefano and Meisler would go and talk with the defendant and Agents Wisnovsky and Dolan would wait at the dock area. Agents DiStefano and Meisler went to defendant's office and asked for him; and the defendant and Agent Meisler recognized each other and spoke about past meetings. The said agents did not advise the defendant regarding their purpose before questioning him and in general conversation elicited from him that he had purchased many fork lift trucks including a Clark fork lift truck at about the time of the alleged theft and they further

elicited that he paid for it by check and had a bill of sale. The defendant then gave said agents permission to examine all the fork lift trucks on his premises. A consent to search form was never read to the defendant and he was not advised as to the real purpose of their investigation until after the fork lift truck was located. This court further finds that the entire atmposhere of the investigation was one of a routine matter with no indication being given to the defendant that he was under investigation for possession of a stolen fork lift truck. The court finds that only after the agents ascertained that the Clark fork lift truck was one of the three stolen from an interstate shipment was the defendant advised of the real purpose of the agents' visit and only then was he given Miranda warnings. After the warning the defendant refused to answer any further questions. This court further finds the government seized the alleged stolen fork lift truck and subpoenaed the bill of sale and checks, knowledge of which was gained prior to defendant having been given the Miranda warnings.

## CONCLUSIONS OF LAW

That at the time the agents went to the defendant's premises on February 26, 1970, having received information from a confidential informant that a truck stolen from an interstate shipment on December 9, 1969, was on premises which were owned by the defendant, the investigation was no longer a general inquiry into an unsolved crime but began to focus on a particular suspect, to-wit: the defendant. This court finds that the defendant was entitled to be given the Miranda warnings prior to being questioned and that the failure of the special agents of the FBI to so advise defendant requires the holding by this court that the evidence procured was illegally seized and is therefore inadmissible.

/s/ William J. Lynch
Judge, United States District Court

Dated: April 21, 1972

## REASONS FOR GRANTING THE WRIT

### 1.

**A focal suspect in a criminal investigation is confronted with our adversary system requiring that Miranda warnings be given before any questioning takes place by federal agents.**

It is respectfully submitted that at the time a person becomes a focal suspect in a criminal investigation our adversary system begins to operate and he is entitled to be made aware of that fact and to be given *Miranda* warnings before being questioned by federal agents. The obvious purpose of the agents interrogating him is to elicit incriminating statements. This is especially so when, as in the case presently before this Court, the petitioner unknowingly had become a focal suspect and the manner in which the interview was conducted by federal agents was designed to keep him ignorant of such fact.

The Court in *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969) held in adopting and approving the rationale of *United States* v. *Turzynski*, 268 F. Supp. 847 (N. D. Ill. 1967), that since the inception of the adversary process was the core of the Court's concern in *Escobedo* and *Miranda*, and that custody or detention was a recognizable point and constituted tangible evidence that the adversary process had begun, that once a taxpayer was under criminal investigation he must be advised that he is the subject of a criminal investigation and *Miranda* warnings must be given him before any questioning takes place; because at that time he is a suspect and a potential criminal defendant and at that point the adversary pro-

cess had in fact begun and this is so despite the absence of physical custody and without regard to the individual taxpayer's subjective state of mind; and that intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's decision in *Miranda*. See also *United States* v. *Habig*, 413 F.2d 1108, 1110 (7th Cir. 1969). Also in accord *United States* v. *Wainright*, 284 F. Supp. 129 (D. Colo. 1969).

In *Escobedo* v. *Illinois*, 378 U.S. 478, 492 (1964), the Court pointed out that "when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — *our adversary system begins to operate* • • •" and the Sixth Amendment rights and protections are available to the suspect.

In *Miranda* v. *Arizona*, 384 U.S. 436, 469 (1966), the Court in discussing the reasons the warning is needed stated that it is only through an awareness of the consequences that there can be any assurance of a real understanding and intelligent exercise of the privilege. "*Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.*" That the warnings must be given regardless of the subjective state of mind of the suspect regarding whether he was aware of his rights without a warning being given. The Court stated that "moreover, any evidence that the accused was threatened, *tricked*, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* at 476.

The question of custody has been dealt with and the Courts have held that actual custody is not a prerequisite

to the necessity of a *Miranda* warning. The United States Supreme Court has held that these warnings are required prior to interrogating a suspect in his own bedroom, *Orzoco* v. *Texas,* 394 U.S. 324 (1969), and in a tax investigation where the defendant was in custody for reasons other than the tax investigation, *Mathis* v. *United States,* 391 U.S. 1 (1968).

On Petition for Rehearing *en banc,* we called to the Court of Appeals' attention its erroneous interpretation of the *Dickerson* case in refusing to apply the *Dickerson* case to the present case solely on the basis of the subjective state of mind of the person being interviewed, *i.e.,* the potential for confusion in the mind of the person being interviewed as to the nature of the inquiry, in direct contradiction of the *Dickerson* case which held decisively that it was irrelevant and that the core of the inquiry was, pursuant to the holding in the United States Supreme Court rulings in *Escobedo* and *Miranda,* "the inception of the adversary process". We further pointed out that a person being interviewed by F.B.I. agents is in a situation where the potential for being misled as to the nature of the investigation is even greater than in taxpayer investigations; for in a taxpayer situation, there is no doubt in the mind of the taxpayer that he is the subject of the investigation and when the matter is referred to the Intelligence Division for possible fraud violation that Court has concluded that at that point the taxpayer is under suspicion of fraud and not only is he entitled to know the nature of the investigation, *i.e.,* criminal, but he is also entitled to the *Miranda* warnings, and this is so even though it is not known whether or not, in fact, a crime has been committed. However, in F.B.I. situations a person being interviewed not only does not know or have

any reason to believe he is a suspect, as opposed to a witness, but also a crime has in fact been committed and the only purpose of the interview of a person who, in fact, is a suspect is to secure incriminating statements from him.

It must be remembered that the District Court found that the petitioner was a focal suspect in the investigation. This cannot be disputed for the agents had information that he was in possession of goods recently stolen from an interstate shipment, and such fact does give rise to the inference that the petitioner knew the property had been stolen. The District Court further found that the petitioner was misled as to the nature of the investigation being conducted and was not aware of his status. The rationale of *Dickerson* is that because the taxpayer does not know he is suspected of being a perpetrator of a crime and is being asked to give evidence against himself, unknowingly, he must be advised of the nature of the investigation and given the *Miranda* warnings.

It is respectfully submitted that under the circumstances of this case, the petitioner was, as was the taxpayer in *Dickerson,* confronted with governmental authority in an adversary situation and should have been accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under such circumstances. The petitioner should have, at the very least, been advised of the nature of the investigation, *i.e.,* "that the agents had information that goods stolen from an interstate shipment was on his premises."

2.

**Are Miranda warnings required for a valid consensual search where the person giving consent to search is unaware that he is a focal suspect and is not informed and is deliberately misled as to the nature of the investigation?**

The Court of Appeals held that there was a valid consensual search of the premises owned by the defendant and that the *Miranda* warnings are a *sine qua non* to a valid consensual search under the Fourth Amendment.

It is respectfully submitted that from the findings of facts and conclusions of law of the District Court, not disturbed by the Court of Appeals, that by failing to so advise the petitioner of the nature of the investigation when the criminal investigation was focused on the petitioner herein that the consent given to search was not an intentional relinquishment or abandonment of a known right or privilege. Moreover, the District Judge held, in effect, and the facts so indicate clearly that the petitioner would not have consented had he known of the deception practiced by the agents in not so advising him of the nature of the investigation and the manner in which the interview was conducted. In effect the request to search under these circumstances, was a request that the petitioner be a witness against himself which he was privileged to refuse under the Fifth Amendment had he been aware of the fact that he was the focus of the investigation and had the privilege to so refuse.

Further, examination of the cases cited by the Court as holding that *Miranda* warnings are not required for a valid consensual search revealed that in every instance some warnings were in fact given as to the nature of the investigation being conducted. No such warnings were given to the petitioner herein, and in fact, the District

Court found that the petitioner was misled by said agents. Apparently the Court of Appeals did not consider the trickery and deception practiced on the petitioner by the agents because of it's holding that "no specific warnings were required prior to the search. (App. "A", p. 6a).

In *United States* v. *Pelensky,* 300 F.Supp. 976 (D. Vermont 1969), the court held that a request to produce evidence that is central to the prosecution's case is a critical stage of the proceedings against the accused within the *Miranda* principle which is not linked solely to protection of Fifth Amendment rights but applies in every critical stage of the proceedings. That the presence of counsel is an effective check on unknowing relinquishment of Fourth Amendment rights just as it is an effective check on the unkowing waiver of Fifth Amendment rights, and hence production of evidence by an accused without waiver of counsel where, as in *Miranda,* cannot be considered a knowing and intelligent act. Therefore, production of evidence by an accused without the assistance of counsel or without waiver of counsel cannot be considered a knowing and intelligent act.

In *United States* v. *Moderacki,* 280 F.Supp. 633 (D. Del. 1968), the Court held that evidence produced by the defendant must be suppressed unless the defendant was given the *Miranda* warnings and a specific warning that he has a right not to consent to search; and in *United States* v. *Fischer,* 329 F.Supp. 630 (D. Minn. 1971), the Court held, at page 634, that a defendant's Fourth Amendment rights are encompassed by *Miranda.*

In *State* v. *Williams,* 432 P.2d 679 (1967), where the defendant was arrested for vagrancy because the officer wanted information concerning the defendant and his companion concerning a burglary and gave consent to search

a locker, *the Court held that such deception violated defendant's constitutional rights as guaranteed him by virtue of the Fourth and Fifth Amendments.* The Court further stated that at the time defendant was interrogated by the police he was a focal suspect of the burglary. The suspicion was confirmed when the police discovered the fruits of the crime. Defendant was then apprised of his constitutional rights and following a brief interrogation he confessed. *The principle announced in Escobedo and Miranda is applicable not only to interrogations leading up to confessions but is equally applicable to interrogation aimed at obtaining the defendant's consent to search and seizure when he is a focal suspect. In effect, the request to search is a request that defendant be a witness against himself which he is privileged to refuse under the Fifth Amendment.*

In *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938), the United States Supreme Court held that "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

In *Channel* v. *United States,* 285 F.2d 217 (9th Cir. 1960), the Court held that a search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search and the government has the burden of proving by clear and positive evidence that such consent was given.

In *United States* v. *Blalock,* 255 F. Supp. 269 (E.D. Pa. 1966), the Court held that, generally, a warrantless search

and seizure is regarded as unreasonable and violative of the Fourth Amendment. *Judd* v. *United States*, 190 F.2d 649 (D.C. Cir. 1951), held that constitutional rights are too fundamental and too precious for waiver lightly to be found; it is only where there is an intentional relinquishment or abandonment of a known right or privilege that an effective waiver can be found. Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth.

3.

**The holding here is in conflict with this Court, the Seventh Circuit Court of Appeals, and various other districts and circuits; certiorari should be granted to resolve the conflict.**

Counsel respectfully submits that the Court's ruling herein is *contra* to the decisions of the United States Supreme Court in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) as hereinbefore set forth in Point 1 of this Petition; and is also in conflict with the holdings of other Courts as discussed in Point 2 of this Petition.

Counsel also respectfully submits that the Court's ruling herein is *contra* to its decision in *United States* v. *Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970) holding that when the inquiry was directed at determining a criminal violation, where the agents were looking for forged alien registration cards, defendant was entitled to be given *Miranda* warnings by the agents who were requesting the defendant to produce his alien registration card. Also, in *United States* v. *Miller*, 395 F.2d 116 (7th Cir. 1968) where agents informed defendant prior to questioning him and asking permission to search that they had information that he was in possession of goods stolen from an interstate

shipment and also gave him *Miranda* warnings, this Court held that the agents acted in a reasonable manner and no deception was used and that the consent to search given by the defendant was voluntarily and intelligently made and therefore there was a sufficient warning of defendant's rights under the Fourth Amendment.

The law with respect to whether or not *Miranda* v. *Arizona* is applicable to a focal suspect not in physical custody and to searches and seizures still needs clarification by this Court for the guidance of lower courts and to resolve the conflicts within the Seventh Circuit and the other districts and circuits cited herein.

## CONCLUSION

Because the issues here are of transcendental importance to the administration of criminal justice, and because the holding by the Seventh Circuit is in apparent conflict with the holdings of this Court and with prior decisions of the Seventh Circuit and other district and appellate courts, we submit the Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 SEPTEMBER SESSION, 1972

No. 72-1366

UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

v.

ANTHONY SICILIA,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 CR 188
WILLIAM J. LYNCH,
*Judge.*

ARGUED DECEMBER 8, 1972—DECIDED MARCH 1, 1973

Before SWYGERT, *Chief Judge,* and PELL and STEVENS, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal by the Government, pursuant to 18 U.S.C. § 3731, from an order of the district court finding that special agents of the Federal Bureau of Investigation had failed to advise Sicilia of his constitutional rights pursuant to the mandate of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and that, therefore, all of "the evidence procured was illegally seized and inadmissible."[1] On February 26, 1970, four F.B.I.

[1] Following an evidentiary hearing on December 9 and 11, 1970, the district court entered an order granting

agents went to the A & S Cartage Company pursuant to information given them by a confidential informer that one of three Clark fork lift trucks stolen from an interstate shipment was the premises. Only Agents DiStefano and Mieseler went inside. Agent Mieseler, who had not previously been involved in the investigation, had gone on this trip because he had known the president of A & S Cartage, Anthony Sicilia, from a previous but unrelated investigation.

There is a substantial discrepancy between the parties' versions as to what the agents said and did during the initial interview with Sicilia. The agents both testified that they informed him of the nature of the investigation and that he told them that he had recently purchased a Clark fork lift. The agents, according to their testimony, then asked him to sign a consent to search form, which he did. Thereafter they searched the building and found the stolen vehicle. When they returned to the office, the agents then read Sicilia the standard statement of rights (*Miranda*). He refused to sign the waiver or discuss the fork lift truck further.

On the other hand, Sicilia testified, and the district court in its findings of fact found Sicilia's testimony in this respect to be true, that the agents did not inform him of the nature of the investigation, that they did not read him the consent to search form, that he never knowingly signed such a form, and that the only form he signed was what he thought was a receipt for the seized fork lift. Sicilia also testified, and the district court found to

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[1] (Continued)
defendant's motion to suppress. On March 13, 1972, another panel of this court determined that it could not rule on the case without findings of fact and conclusions of law. It therefore remanded the case to the district court directing it to make such findings, *United States* v. *Sicilia*, 457 F.2d 787 (7th Cir. 1972). On April 21, 1972, the district court entered the required findings of fact and conclusions of law. It is from this order that the Government appeals.

be true, that the agents asked him questions about his recent purchases of fork lifts. On the basis of these findings the district court concluded that at the time the agents arrived on the premises "the investigation was no longer a general inquiry into an unsolved crime but began to focus on a particular suspect, to-wit: the defendant. This court finds that the defendant was entitled to be given the Miranda warnings prior to being questioned. . . ."

The only citation of authority by the district court in support of its order was the *Miranda* case. We note that the Court stated that the principles there announced "deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 477. Here it cannot be contended that Sicilia was the subject of in-custody interrogation. Rather he was at most the subject of limited questioning in the comforting confines of his own office at a company of which he was the chief executive officer. To avoid this obvious limitation on the applicability of *Miranda* to this case, the district court apparently adopted the focus theory enunciated in *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969).

In *Dickerson*, this court held that once a taxpayer was under criminal investigation he must be given a warning of his constitutional rights as spelled out in *Miranda* before any further questioning can take place. It is from this decision that Sicilia on appeal, and apparently the district court in the proceedings below, extrapolates the theory that once a criminal investigation "focuses" on an individual he must be warned of his constitutional rights. In our view this analysis is inaccurate. The nature of the facts in *Dickerson* limits its general applicability. That case revolves about the distinction between two types of I.R.S. agents: revenue agents and special agents. In general, special agents are concerned with criminal inves-

tigations. On the other hand, the audit type of investigations are handled by revenue agents with no particular contemplation of criminal prosecution. There, therefore, is considerable potential for the taxpayer being misled as to the nature of the investigation. In the case of the F.B.I. agents, they are ordinarily associated in the public view with criminal investigation. Specifically in the present case there was no ambiguity in the investigative call on Sicilia—the agents were ont to catch a thief. Thus, the underlying rationale for *Dickerson*, the potential for confusion in the mind of the person being interviewed as to the nature of the injuiry, can be said to justify an expansion of the *Miranda* requirements beyond the in-custody case for the warning to be required.

The potential for confusion not being present in the case before us, we decline to extend the *Dickerson* requirement of *Miranda* warning to it. We find no special risk that Sicilia was misled as to the nature of the investigation. He was neither in custody nor "otherwise deprived of his freedom in any significant way." See *Orozco* v. *Texas*, 394 U.S. 324, 327 (1969).

At the time the agents initially interrogated Sicilia, there is no indication in the record which would have brought about an in-custody type of situation. Even if the agents had had positive proof that the stolen fork lift was on the premises of A & S Cartage, rather than just the uncorroborated tip of an informant, there would have been no reason to assume that Sicilia, even though he was president of the corporation, had been the individual who had purchased the stolen fork lift, or that he even had any special knowledge of its presence on the premises. The fact that after the F.B.I. agents had specifically identified the Clark fork lift as one of those stolen and Sicilia had stated that he had purchased it, the agents then gave Sicilia a *Miranda* warning is irrelevant to the issue of the first interview. We can only attribute this to some feeling on their part in the nature of an abundance of caution. *United States* v. *Krilich*, No. 71-1678, .... F.2d

.... (7th Cir., filed Nov. 28, 1972) (slip opinion p. 11). A probably unnecessary subsequent *Miranda* warning can scarcely create the necessity for such warning in the earlier and different factual situation.

Sicilia also argues that the search which discovered the stolen Clark fork lift truck was invalid because he was not warned of his rights similar to a *Miranda* warning. Thus, the district court found that he was not given a consent to search form, even though the Government did produce a consent to search signed by Sicilia who obviously was not an unsophisticated derelict. Sicilia argues that, even if we were to hold this finding of the district court clearly erroneous, we would still have to invalidate the search since the consent to search form itself is not a sufficient warning of *Miranda* rights. On the facts of this case, we hold that there was a valid consensual search of the premises of A & S Cartage and that the discovery of the stolen fork lift was not illegal. As to the initial claim that the warnings required by the Fifth and Sixth Amendments under *Miranda* are a *sine qua non* to a valid consensual search under the Fourth Amendment, this court has clearly rejected such a view. *United States* v. *Young*, No. 71-1589, .... F.2d .... (7th Cir., filed Oct. 25, 1972); *United States* v. *Hayward*, No. 71-1933, .... F.2d .... (7th Cir., filed Dec. 1, 1972); *United States* v. *Habig*, No. 71-1654, .... F.2d .... (7th Cir., filed Jan. 24, 1973).

While some of Sicilia's testimony may raise doubts as to its credibility, we have herein accorded the customary deference to the district court's credibility determination based upon its observation of the witnesses. From that position, the district court chose to disbelieve the two F.B.I. agents and to accept the version presented by Sicilia.

Taking his testimony as true it is illuminating, and dispositive, on the present issue.

> Q. Will you relate to the Court what questions they asked you and what answers you gave?

A. They asked me first whether I owned any Cl
lift trucks. I said, "Yes."

"Do you own any other type of lift trucks?"

I said, "Yes."

Meisler [sic] did all the questioning at that time.
said, "Did you purchase a Clark lift truck recen

And I said, "Yes, about two months ago I did p
chase one."

Then Meisler [sic] said, "Can we examine the
trucks that you have on your docks?"

And I told him, yes, he could see any of them.

At that moment I called up my superintendent,
Broderick, and told him that two fellows—I did
even tell them they were FBI—were coming down
examine all our lift trucks, and I told him to sh
them all of them.

Later on, about five minutes later, he called b
and he said one of the trucks that you recently p
chased is in a trailer, we're taking it over to our ot
warehouse.

I told Jim Broderick to show him—to show th
agents that one, too. They went down and they w
gone for some time—

No other reason appears in the record, and no other r
son is suggested or suggests itself, for the F.B.I. agents
ask to look at lift trucks on the docks except that th
were in some way involved in a crime or criminal inve
gation.

Not only did Sicilia consent to such a search by his o
testimony, but he also called his superintendent and t
him that two men were coming down to look at the
trucks and that they were to be shown "all of them."
is clear that Sicilia's express consent was both voluntar
and intelligently given. Since no specific warnings w
required prior to the search, we hold that the search w
proper. We thus do not reach the question of whet
the district court's finding of fact relating to the signi
of the consent to search form is clearly erroneous a

should be set aside since it conflicts with the fact that there was a signed form and a signed receipt for the lift truck even though Sicilia testified, and the district court apparently found, that he signed only one paper that day.

For the reasons given hereinbefore the judgment of the district court is reversed and the case is remanded for further proceedings. While the case is not being remanded for a new trial within the technical meaning of Circuit Rule 23, the development of the factual situation as to one salient aspect of this litigation had progressed sufficiently for us to deem it advisable, and so to order, that the case be reassigned on remand to another judge.

REVERSED AND REMANDED.

## APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
April 13, 1973

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

No. 72-1366 vs.

ANTHONY SICILIA,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of defendant-appellee Anthony Sicilia, for a rehearing by the court *en banc* in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the defendant-appellee for a rehearing *en banc* in the above-entitled appeal be, and the same is hereby denied.

## APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971—JANUARY SESSION, 1972

No. 71-1292

UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

v.

ANTHONY SICILIA,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 CR 188

WILLIAM J. LYNCH,
*Judge.*

March 13, 1972

Before SWYGERT, *Chief Judge,* STEVENS, *Circuit Julge,* and ESCHBACH, *District Judge.**

PER CURIAM. The issue raised by this appeal is whether the district court erred in granting defendant-appellee Sicilia's motion to suppress certain evidence found by the district court to have been seized in violation of Sicilia's constitutional rights. We find that on the basis of the record before us, we are unable to reach this issue.

* The Honorable Jesse E. Eschbach, United States District Judge for the Northern District of Indiana, is sitting by designation.

The court is unable to even briefly recite the facts in this cause, as the district court judge made no recorded findings of fact. Following the submission of the evidence, the court concluded from the bench that "The motion to suppress the evidence in this case is granted, the Court feeling that the provisions and requirements of the *Miranda* case were not complied with by the FBI." This appeal raises numerous complex legal issues concerning the extent of the protection accorded defendant under the Fourt and Fifth Amendment, including, *inter alia,* the validity of an alleged consent to search and the requirement of *Miranda* warnings under the circumstances here presented. Moreover, it is obvious from the transcript of these proceedings that there existed material factual disputes between the FBI agents and the defendant and his son. It becomes impossible to resolve these issues without some factual basis from which this court can proceed.

The defendant-appellee argues that the correct test to be applied by an appellate tribunal to a district court's findings of fact on a motion to suppress is the "clearly erroneous" test prescribed in *Fed. R. Civ. P.* 52(a) and applied to a motion to suppress in the criminal context in *Haire* v. *Sarver,* 437 F.2d 1262 (8th Cir. 1971), *Wren* v. *United States,* 352 F.2d 617 (10th Cir. 1965), *cert. denied,* 384 U.S. 944 (1966), and *United States* v. *Page,* 302 F.2d 81 (9th Cir. 1962). Assuming for the moment that this is the proper test, we are yet unable to reach the issues before us because the court is presented with no findings to which it can apply that test. The Federal Rules of Criminal Procedure to not specifically mandate that a recorded finding of fact be made by the trial judge on a motion to suppress. However, this court notes that a district judge would be well advised, at least in this circuit, to record his findings of fact and conclusions thereon, especially where, as here, the factual and legal context is somewhat complicated.

Accordingly, this cause is remanded to the district court with directions to record findings of fact and conclusions thereon.

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1521

ANTHONY SICILIA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The issue presented is whether federal agents in the course of a routine investigation of stolen property were required to give *Miranda* warnings to petitioner before entering into conversation with him and obtaining his consent to search his business premises.

An indictment filed in the United States District Court for the Northern District of Illinois charged petitioner with possession of goods stolen from an interstate shipment, in violation of 18 U.S.C. 659. Prior to trial petitioner moved to suppress statements made by him to F.B.I. agents who did not provide him with a *Miranda* warning, and to suppress evidence concerning a stolen fork lift truck found by the agents on petitioner's business premises. After a hearing, the district judge ordered the evidence suppressed. On the

government's appeal, the court of appeals first remanded with directions to the district judge to record findings of fact and conclusions of law. *United States* v. *Sicilia*, 457 F. 2d 787 (C.A. 7) (Pet. App. 9a-10a). After the district judge recorded his findings and conclusions on April 21, 1972, (Pet. 3-4), the court of appeals reversed (Pet. App. 1a-7a).

1. The evidence showed that on February 26, 1970, a confidential informant told the F.B.I. that a Clark fork lift truck stolen more than two months before from an interstate shipment could be found on the premises of the A & S Cartage Company in Chicago, Illinois. On that day four agents proceeded to the cartage company to speak with petitioner, who they had learned was president and owner of the business. One of the four agents, Agent Meisler, knew petitioner from previous contacts on unrelated matters.

Upon arriving at petitioner's business, two of the agents, including Meisler, entered petitioner's office to talk with him while the other two waited at a dock area. Petitioner and the two agents inside engaged in a general discussion, initially recalling past meetings with Meisler. In the course of this conversation, the matter of recent purchases of fork lift trucks was raised by the agents. Petitioner told the agents that he had purchased a number of fork lift trucks, including a Clark fork lift truck, at about the time of the theft, and had paid for them by check, receiving a bill of sale. He permitted the agents to examine all of the fork lift trucks on the premises. After a short search, the agents discovered a lift truck bearing a serial number matching that of one of the stolen trucks. Petitioner was then advised of his right to silence and to counsel; he made no statements thereafter (see findings of facts reproduced at Pet. 3-4).

2. Petitioner claims that he was entitled to a *Miranda* warning before the agents initiated any conversation with him, and that without a warning the statements he made to the agents and his consent to search the trucks were unlawfully obtained. However, *Miranda* warnings are required only as part of a "custodial interrogation," which this Court has defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 444. Nothing in the record indicates that petitioner was in custody or under any restraint at the time of his conversations with the agents. See *Posey* v. *United States*, 416 F. 2d 545, 549-550 (C.A. 5), certiorari denied, 397 U.S. 946; *United States* v. *Lacy*, 446 F. 2d 511 (C.A. 5).[1]

Similarly, a *Miranda*-type warning advising petitioner that he could refuse to consent to the search was not necessary as a condition to obtaining lawful consent from an individual who, as here, was being interviewed in a "home or office, and under informal and unstructured conditions." *Schneckloth* v. *Bustamonte*, No. 71-732, decided May 29, 1973 (slip op., pp. 14, 30-31).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JULY 1973.

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[1] The total absence of restraint and the non-accusatorial setting in which the agents conversed with petitioner distinguish this case from *Orozco* v. *Texas*, 394 U.S. 324, and *Mathis* v. *United States*, 391 U.S. 1, relied upon by petitioner (Pet. 7).